Soon Teik Development Sdn Bhd v Liew Tuo Chee & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–926 OF 2006

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ZALEHA ZAHARI, ZAINUN ALI AND ZAHARAH IBRAHIM JJCA
18 AUGUST 2011

C

Contract — Building contract — Certificate of practical completion — Vacant possession to be handed over upon issuance of certificate of practical completion — Whether 'Notice on the Schedule of Payment' issued by architect amounted to certificate of practical completion — Whether vacant possession notice may be issued without certificate of practical completion — Whether purported vacant possession notices defective — Whether delay in completion — Whether purchaser may claim liquidated damages — Whether claim time barred

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The defendant/appellant was the developer of a commercial complex. The first plaintiff/respondent, by a sale and purchase agreement ('SPA') dated 26 October 1995 purchased Unit No 3-082 whilst the second and third plaintiffs/respondents by SPA dated 27 September 1995 purchased Unit No 1–015. Clause 24.1 of the SPA stated that the defendant was to deliver vacant possession of the respective units within 36 months from the date of the SPA. Clause 24.2 stated that failure by the defendant to do so within that period entitled the plaintiffs to be paid liquidated and ascertained damages ('LAD'). The defendant was required to take steps to procure a certificate of fitness for occupation ('CFO') of the units purchased by cl 26.1 of the SPA. Clause 25 provided that upon issuance of the certificate by the vendor's architect certifying that the construction of the property has been practically completed in accordance thereof the vendor shall permit the purchaser into possession of the property. The architect issued a certificate dated 22 December 1997 bearing the heading 'Schedule of Payment — Progress Payable'. The defendant purported to issue vacant possession notices on 2 January 1998. On 20 October 2002 Dewan Bandaraya issued the CFO for the said complex. The plaintiffs claimed for liquidated damages for failure to deliver vacant possession of the respective units within the time specified in the respective SPA. The High Court allowed the plaintiffs' claim and hence this appeal. The defendant's counsel submitted that the architect's certificate dated 22 December 1997 was the certificate envisaged under cl 25.1 and that upon issuance the notice dated 2 January 1998 the defendant had delivered vacant possession in accordance with cl 25. It was also submitted that since the completion date of the SPAs were 26 October 1998 and 27 September 1998 respectively, the plaintiffs'

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application was time barred as it was filed more that six years from the completion date (ie on 8 March 2005).

Held, dismissing the appeal:

(1) Under cl 25 it was incumbent upon the defendant to produce a copy of the architect's certificate of practical completion. The document issued by the architect which formed the thrust of the defendant's defence was not a certificate of practical completion envisaged by cl 25. A 'Notice on the Schedule of Payment' was certainly not a certificate that the construction of the units purchased by the plaintiffs' had been practically completed for vacant possession to be delivered. There was no provision allowing the defendant to issue a vacant possession notice without a certificate of practical completion. The defendant clearly had failed to comply with cl 25 before issuing the purported vacant possession notices on 2 January 1998 (see para 18).

(2) As the CFO was issued on 2 October 2002 and the plaintiffs' application filed on 08 March 2005, the plaintiffs' claim was clearly not time-barred (see para 19).

[Bahasa Malaysia summary

Defendan/perayu adalah pemaju kompleks komersial. Plaintif pertama/responden melalui perjanjian jual beli ('PJB') bertarikh 26 Oktober 1995 membeli Unit No 3-082 sementara plaintif-plaintif kedua dan ketiga melalui PJB bertarikh 27 September 1995 membeli Unit No 1–015. Klausa 24.1 PJB menyatakan bahawa defendan hendaklah menghantar milikan kosong unit-unit masing-masing dalam masa 36 bulan dari tarikh PJB. Klausa 24.2 menyatakan bahawa kegagalan defendan untuk berbuat demikian dalam masa tempoh tersebut membuatkan plaintif berhak dibayar 'liquidated and ascertained damages' ('LAD'). Defendan dikehendaki mengambil langkah-langkah untuk mendapatkan sijil layak menduduki ('CFO') unit-unit yang dibeli melalui klausa 26.1 PJB. Klausa 25 memperuntukkan bahawa selepas pengeluaran sijil oleh arkitek vendor mengesahkan bahawa pembinaan hartanah tersebut secara praktikal telah siap dengan itu vendor boleh membenarkan pembeli memiliki hartanah tersebut. Arkitek mengeluarkan sijil bertarikh 22 Disember 1997 yang membawa tajuk 'Schedule of Payment — Progress Payable'. Defendan dikatakan mengelaurkan notis-notis milikan kosong pada 2 Januari 1998. Pada 20 Oktober 2002 Dewan Bandaraya mengelaurkan CFO untuk kompleks tersebut. Plaintif-plaintif menuntut untuk ganti rugi yang ditetapkan atas kegagalan memberi milikan kosong unit-unit masing-masing dalam masa yang dinyatakan dalam PJB masing-masing. Mahkamah membenarkan tuntutan plaintif dan maka rayuan ini. Peguam defendan berhujah bahawa sijil arkitek bertarikh 22 Disember 1997 adalah sijil yang dibayangkan di bawah klausa 25.1 dan bahawa atas pengeluaran notis bertarikh 2 Januari 1998 defendan telah memberikan

milikan kosong berikutan klausa 25. Ia juga dihujahkan bahawa memandangkan tarikh siap PJB masing-masing adalah 26 Oktober 1998 dan 27 September 1998, permohonan plaintif adalah dihalang had masa kerana ia difailkan lebih dari lebih daripada enam tahun dari tarikh siap (iaitu 8 Mac 2005).

Diputuskan, menolak rayuan:

(1) Di bawah klausa 25 ia adalah kewajipan defendan untuk mengemukakan salinan sijil siap praktikal arkitek. Dokumen yang dikeluarkan oleh arkitek yang membentuk teras pembelaan defendan bukan sijil siap praktikal yang dibayangkan oleh klausa 25. 'Notice on the Schedule of Payment' pasti bukan sijil bahawa pembinaan unit-unit yang dibeli oleh plaintif-plaintif telah secara praktikal siap untuk milikan kosong diberikan. Tidak terdapat peruntukan membenarkan defendan mengeluarkan notis milikan kosong tanpa sijil siap praktikal. Defendan jelas gagal untuk mematuhi klausa 25 sebelum mengeluarkan notis-notis milikan kosong pada 2 Januari 1998 (lihat perenggan 18).

(2) Memandangkan CFO dikeluarkan pada 2 Oktober 2002 dan permohonan plaintif difailkan pada 8 Mac 2005, tuntutan plaintif jelas tidak dihalang masa (lihat perenggan 19).]

Notes

For cases on building contract in general, see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3264–3499.

Legislation referred to

Contracts Act 1950 s 56(3)

Appeal from: Originating Summons No S1–24–454 of 2005 (High Court, Kuala Lumpur)

Lim Fang Say (Henry Lim & Co) for the appellant.
Harpal Singh (Harvinder Kaur with him) (AJ Ariffin, Yeo & Harpal) for the respondent.

Zaleha Zahari JCA (delivering judgment of the court):

[1] Vide originating summons filed on 8 March 2005 the plaintiffs (respondents) claimed for liquidated damages against the defendant (appellant) for failure to deliver vacant possession of the respective unit which they purchased from the defendant within the time specified in the respective sale and purchase agreement, interest as well as costs. The High Court Kuala Lumpur on 5 October 2005 allowed the plaintiffs' claim. The defendant appealed.

[2] The principal issue for determination before the High Court, as well as on appeal before us is, what is the construction to be given to the architect's certificate dated 22 December 1997 ('exh EP3') held out in the affidavit of Liew Tuo Chee affirmed on 7 February 2005.

BACKGROUND

[3] The background facts are these: The defendant is the developer of a commercial complex known as Endah Parade situated at Taman Sri Endah Phase 3, Badar Baru Sri Petaling, Kuala Lumpur. Liew Tuo Chee ('the first plaintiff') by sale and purchase agreement dated 26 October 1995 purchased Unit No 3–082 at a purchase price of RM118,518 whilst Lee Yan Ping and Liew Cheng Tong ('the second plaintiff' and 'third plaintiff') by sale and purchase agreement dated 27 September 1995 purchased Unit No 1–015 at a purchase price of RM247,050 ('the SPA').

[4] The relevant clauses referred to in argument in this appeal are these: cl 24.1 of the SPA states that the defendant is to deliver vacant possession of the respective unit purchased within 36 months from the date of the SPA. Clause 24.2 states that failure by the defendant to do so within this period entitles the plaintiffs to be paid liquidated and ascertained damages ('LAD') at a rate of 10% on such portion of the purchase price paid.

Clause 25.1 then provides as follows:

> 25.1Upon issuance of the certificate by the Vendor's Architect certifying that the construction of the Property has been practically completed in accordance thereof the Vendor shall permit the Purchaser into possession of the Property PROVIDED THAT such possession shall not give the Purchaser the right to occupy and the Purchaser shall not occupy the Property until such time as the certificate of Fitness for Occupation for the Commercial Complex and/or the Property is issued.
>
> 25.2Upon the expiry of the 14 days from the date of a notice from the Vendor requesting the Purchaser to take possession of the Property, whether or not the Purchaser has actually entered into possession or occupation of the Property, the Purchaser shall be deemed to have taken delivery of vacant possession whereupon the Vendor shall cease to be responsible howsoever for any loss or damage to the Property and/or to the fixture and fittings thereon/therein

[5] The defendant is required to take steps to procure a certificate of fitness for occupation of the units purchased by cl 26.1 of the SPA which provides as follows:

> The Vendor shall do all acts and things necessary to procure the issuance of the certificate of Fitness for Occupation in respect of the Property at its own cost and expense, and shall duly comply with all the requirements of the Appropriate Authority which are necessary for the issuance of the certificate of Fitness of Occupation in respect of the Property

[6] On the facts of this case the architect had issued a certificate dated 22 December 1997 bearing the heading 'Schedule of Payment — Progress Payable' of which item 3 states as follows:

ITEM	STAGE OF COMPLETION	%	UNITS/LOT NO COMPELETED	NO OF UNITS
3.	Upon handing over of vacant possession together with water pipes and electrical cabling ready for connection to the Property	2.5	Grd Flr All Completed (17 units)	
			1st Flr All Completed (119 units)	
			2nd Flr All Completed (145 units)	
			3rd Flr All Completed (120 units)	
			4rd Flr All Completed (71 units)	
			5th Flr All Completed (11 units	
			6th Flr All Completed (1 units)	

[7] The defendant then issued a letter dated 2 January 1998 which, inter alia, states as follows:

> We are please to inform you the construction of the above mentioned unit purchase by you is now completed and the vacant possession of the unit is ready for deliver. A copy of the Architect certificate of Completion is enclosed herewith for your reference.
>
> You are required to call at our office at the above address during office hours and within 14 days from the date hereof bringing along with you your payment for the amount of RM3,269.48 as pert the statement of account attached.
>
> If you are purchasing the unit by way of end financing, you are to note that prior to your calling at our office, please ensure that your end financier has paid the progress payment of RM5,925.93 to us and has also deposited 2.5% of the purchase price with our solicitors as a stakeholder.

> Please note that upon the expiry of the 14 days from the date of this notice, you are deemed to have taken vacant possession of the above unit whether or not you have actually entered into possession or occupation of the unit and the 6 months defects liability period shall commence from this date.
>
> …

[8] On 20 october 2002 Dewan Bandaraya issued to the architect the certificate for occupation for the said complex.

THE HIGH COURT JUDGE'S DECISION

[9] The High Court judge ruled that 'exh EP3' was not a certificate of practical completion envisaged by cl 25 of the SPA for the following reasons:

> Having heard the submissions of the parties, I would agree entirely with the counsel for the Plaintiffs that the document's (architect's certificate) was not such a certificate of practical completion as required under Clause 25 of the Agreement.
>
> It is only a document which certifies the stages of completion of the shop lots …
>
> A certificate by an architect certifying practical completion must be a document that leaves no doubt on the face of the document that the construction of the building has been practically completed leaving no room for those who rely on it to say otherwise.
>
> In my view therefore the document (architect's certificate) fell short of this requirement. It is at most a very vague and inconclusive statement ….
>
> This certainly cannot be a certificate of practical completion of the building.
>
> Having determined that the document (architect's certificate) is not such a certificate, it follows therefore in the absence of a proper certificate of practical completion pursuant to clause 25 of the Agreement being issued, the shop lots must be presumed to have not been completed until the issuance of the certificate of fitness for occupation (CF) or anytime before.

[10] The judge then allowed the plaintiffs' application with costs.

THE APPELLANT COUNSEL'S SUBMISSIONS

[11] Time, according to the appellant's counsel, was no longer of the essence, by reason the failure of the plaintiffs to issue a notice under s 56(3) of the Contracts Act 1950. They are deemed to have waived their rights to do so.

[12] The word 'Property' is defined as the plaintiffs' units, not the entire complex. The words 'practically completed' must be read together with section 3 of the Second Schedule of the SPA, and when read together, must be

construed to mean that cl 25.1 is satisfied upon completion up to the stage of electrical cabling ready for connection to the plaintiffs' units. The words 'vacant possession' in cl 24 must be distinguished from 'right of occupation' in cl 26. 'Vacant possession' means completion of the individual units up to the stage of 'electrical cabling is ready for connection to the Property'.

[13] The appellant's counsel submitted that the architect's certificate dated 22 December 1997 serves to inform the defendant (as developer) that the units specified in the said certificate had been completed practically for the purpose of delivery of vacant possession. This architect's certificate was the certificate envisaged under cl 25.1. As the plaintiffs' units was situated on the third floor and the first floor respectively, their units are therefore deemed to have been completed. The letter dated 2 January 1998 to the plaintiffs, expressly states that the plaintiffs is deemed to have taken vacant possession of their respective unit even if they did not take actual possession or occupation of the relevant unit. The appellant's counsel submitted that upon issuance the notice dated 2 January 1998 (which date is prior to the completion date) the defendant had delivered vacant possession in accordance with cll 25.1 and 25.2.

[14] The defendant had applied for the certificate of fitness and obtained the same on 2 October 2002.

[15] Even if one were to accept that the completion date of the SPA was 26 October 1998 and 27 September 1998 respectively, as the plaintiff's application was filed more that six years from the completion date (ie on 8 March 2005), the appellant's counsel submitted that the claim was therefore time-barred.

THE RESPONDENTS' COUNSEL'S SUBMISSIONS

[16] Clause 25 makes it mandatory for the architect's certificate of practical completion to be attached to the delivery of vacant possession notice certifying that the construction of the property purchased had been practically completed. On the facts of this case the defendant only submitted a copy of the architect's 'Schedule of Payment-Progress report' as opposed to the 'certificate of practical completion' envisaged in cl 25. The learned judge was therefore right in ruling that the architect's 'Schedule of Payment-Progress' payable notice dated 22 December 1997 is not the certificate of practical completion envisaged under cl 25 but plainly a notice of the schedule of payment. There was no provision allowing the defendant to issue a vacant possession notice without a certificate of practical completion. There is no evidence of the appellant having complied with cl 25 before issuing the notice which they did on 2 January 1998. The defendant had accordingly failed to deliver vacant possession of the units purchased in accordance with cl 25.

[17] It is a prerequisite that a property should be certified as safe for occupation and Form E must be duly acknowledged and accepted by the relevant authorities before vacant possession can be delivered (By Law 25 of the Uniform Buildings By laws 1984). From the evidence, the date the appellant delivered vacant possession was on 2 October 2002.

DECISION

[18] Under cl 25 of the SPA it is incumbent upon the appellant to produce a copy of the architect's certificate of practical completion. We are in agreement with the learned judge that the document issued by the architect which formed the thrust of the defendant's defence was not a certificate of practical completion envisaged by cl 25. We agree with the learned judge that a 'Notice on the Schedule of Payment' was certainly not a certificate that the construction of the units purchased by the plaintiffs' had been practically completed for vacant possession to be delivered. There was no provision allowing the defendant to issue a vacant possession notice without a certificate of practical completion. The defendant clearly had failed to comply with cl 25 before issuing the purported vacant possession notices on 2 January 1998 which they did.

[19] As the certificate of fitness of occupation was issued on 2 October 2002 and the plaintiffs' application filed on 8 March 2005, the plaintiffs' claim is clearly not time-barred.

[20] The appeal is dismissed. The decision of the learned High Court judge was affirmed. Costs of RM5,000 to the respondent. The deposit to the respondents to account of costs.

Appeal dismissed.

Reported by Kanesh Sundrum